Supreme Court, U.S.
FILED
JUN 6 1980
MICHAEL RODAK, JR., CLERK

No. 79-900

In the Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

JOANNE L. LEVINE
MARK W. HAASE
Attorneys
Federal Trade Commission
Washington, D.C. 20580

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
A. Proceedings before the Commission	4
B. Proceedings in the Courts below	6
Summary of argument	12
Argument:	
I. The Federal Trade Commission's issuance of an administrative complaint stating its reasons to believe that the respondents are engaged in unfair methods of competition is an exercise of agency discretion not subject to judicial review	15
A. The decision to issue an administrative complaint is not "agency action" within the meaning of 5 U.S.C. 701	15
B. If issuance of an administrative complaint is "agency action," it is within the discretionary function exception in 5 U.S.C. 701(a)(2)	23

Argument—Continued Page

1. The phrase "reason to believe" in Section 5(b) of the FTC Act does not define a judicially enforceable restriction on the Commission's discretion to initiate cease-and-desist proceedings 24
2. The issuance of an administrative complaint is an exercise of unreviewable prosecutorial discretion 35
3. Review of the making of a "reason to believe" determination would require an unjustified inquiry into the Commissioners' mental processes 44

II. The Commission's issuance of an administrative complaint is not "final agency action" subject to immediate judicial review during the pendency of the ensuing adjudicative proceeding..... 49

Conclusion 60

CITATIONS

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 .....19, 33, 50
Action on Safety and Health v. *FTC*, 498 F.2d 757 48
Alfred Dunhill Ltd. v. *Interstate Cigar Co.*, 499 F.2d 232 43
Ass'n of Data Processing Serv. Organizations v. *Camp*, 397 U.S. 150 25

Cases—Continued Page

Ass'n of National Advertisers Inc. v. *FTC*, No. 79-1117 (D.C. Cir. Dec. 27, 1979) 52, 58, 59
Atlantic Refining Co. v. *FTC*, 381 U.S. 357 56
Atlantic Richfield Co. v. *FTC*, 398 Supp. 1, aff'd, 546 F.2d 646 59
Bachowski v. *Brennan*, 502 F.2d 79 38
Barlow v. *Collins*, 395 U.S. 159 25
Boire v. *Greyhound Corp.*, 376 U.S. 473 52
Bordenkircher v. *Hayes*, 434 U.S. 357 35
Chicago & Southern Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 ..... 19, 55
Chrysler Corp. v. *Brown*, 441 U.S. 281 22
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 ..... 8-9, 23-24, 25, 45
City of Tacoma v. *Tax Payers of Tacoma*, 357 U.S. 320 57
Costello v. *United States*, 350 U.S. 359 34
Deering Milliken, Inc. v. *Johnston*, 295 F.2d 856 22
Dolcin Corp. v. *FTC*, 219 F.2d 742, cert. denied, 348 U.S. 981 55
Dunlop v. *Bachowski*, 421 U.S. 560 ..... 19, 25, 38
Elmo Division of Drive-X Co. v. *Dixon*, 348 F.2d 342 48
Ewing v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 ..... 33, 41, 58
FPC v. *Arkansas Power & Light Co.*, 330 U.S. 802, rev'g 156 F.2d 821 52
FPC v. *Metropolitan Edison Co.*, 304 U.S. 375 ..... 19, 21, 52, 58
FTC v. *British Oxygen Co.*, 529 F.2d 196 43

Cases—Continued Page

FTC Corporate Patterns Report Litigation, In re, 1977-2 Trade Cas. (CCH) ¶ 61,544, aff'd *sub nom., Appeal of FTC Line of Business Litigation*, 595 F.2d 685, cert. denied, 439 U.S. 958 ..... 18, 22
FTC v. *Dean Foods Co.*, 384 U.S. 597..... 59
FTC v. *Klesner*, 280 U.S. 19 ..... 39, 43
FTC v. *National Tea Co.*, 603 F.2d 694.... 43
FTC v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 29
FTC v. *Sperry & Hutchinson Co.*, 405 U.S. 233 29
FTC v. *Universal-Rundle Corp.*, 387 U.S. 244 29
Friends of Yosemite v. *Frizzell*, 420 F. Supp. 390 18
Frito-Lay, Inc. v. *FTC*, 380 F.2d 8 59
Gifford-Hill & Co. v. *FTC*, 523 F.2d 730.. 20
Greater N.Y. Hosp. Ass'n v. *Mathews*, 536 F.2d 494 26
Gulf Oil Corp. v. *FPC*, 563 F.2d 588 46
Hahn v. *Gottlieb*, 430 F.2d 1243 26
Harrison v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980) 59
Hearst Radio, Inc. v. *FCC*, 167 F.2d 225.. 18
Hercules, Inc. v. *EPA*, 598 F.2d 91 45
Hills Bros. v. *FTC*, 9 F.2d 481, cert. denied, 270 U.S. 662 .....27, 28, 56
Holloway v. *Bristol-Myers Corporation*, 485 F.2d 986 43
Hunt Foods and Industries, Inc. v. *FTC*, 286 F.2d 803, cert. denied, 365 U.S. 877 ..... 31, 32

Cases—Continued Page

ICC v. *Atlantic Coast Line R.R.*, 383 U.S. 576 43
ITT v. *Local 134, IBEW*, 419 U.S. 428..12, 18, 22
Independent Broker-Dealers Trade Ass'n v. *SEC*, 442 F.2d 132, cert. denied, 404 U.S. 828 22
Jewel Companies, Inc. v. *FTC*, 432 F.2d 1155 ..... 27, 48
Leedom v. *Kyne*, 358 U.S. 184 40
Macauley v. *Waterman S.S. Corp.*, 327 U.S. 540 .....21, 23, 52
McGee v. *United States*, 402 U.S. 479..... 54
Mathews v. *Eldridge*, 424 U.S. 319 53
Montrose Chemical Corp. of California v. *Train*, 491 F.2d 63 48
Moog Industries, Inc. v. *FTC*, 355 U.S. 411 ..... 29, 36
Morris v. *Gressette*, 432 U.S. 491 ..... 25, 44
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 .....21, 49, 53
NLRB v. *Plasterer's Union*, 404 U.S. 116.. 20
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 36
National Nutritional Goods Ass'n v. *FDA*, 491 F.2d 1141 47
National Ornament & Electric Light Christmas Ass'n v. *CPSC*, 526 F.2d 1368 18
Natural Resources Defense Council Inc. v. *SEC*, 606 F.2d 1031 26
Parisi v. *Davidson*, 405 U.S. 34 54
People for Environmental Progress v. *Leisz*, 373 F. Supp. 589 18

Cases—Continued Page

Petroleum Exploration, Inc. v. *Public Service Comm'n*, 304 U.S. 209 ..... 33, 52, 53
Pharmaceutical Mfrs. Ass'n v. *Kennedy*, 471 F. Supp. 1224 18
Pillsbury Co. v. *FTC*, 354 F.2d 952 ..... 6, 47
Public Utilities Comm'n v. *United States*, 356 F.2d 236 18
Renegotiation Board v. *Bannercraft Co.*, 415 U.S. 1 ..... 52, 53
Schilling v. *Rogers*, 363 U.S. 666 40
Southern Ry. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 ..... 25, 26
Standard Oil (Ind.) v. *FTC*, 475 F. Supp. 1261, appeal dismissed, No. 79-448 (7th Cir. Dec. 5, 1979) 11
Switchmen's Union of North America v. *National Mediation Board*, 320 U.S. 297 26
Texas & New Orleans R.R. Co. v. *B'hd. of Railway & Steamship Clerks*, 281 U.S. 548 42
Thermal Ecology Must Be Preserved v. *AEC*, 433 F.2d 524 44
United States v. *Calandra*, 414 U.S. 338.. 34
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 ..... 40, 41
United States v. *Los Angeles & Salt Lake R.R. Co.*, 273 U.S. 299 19
United States v. *Lovasco*, 431 U.S. 783.... 35
United States v. *Morgan*, 313 U.S. 409.... 24, 44
United States v. *Morton Salt Co.*, 338 U.S. 632 33
United States v. *Nixon*, 418 U.S. 683..... 35
Vaca v. *Sipes*, 386 U.S. 171 39

Cases—Continued Page

Warner v. *Cox*, 487 F.2d 1301 54-55
Whitney National Bank v. *Bank of New Orleans*, 379 U.S. 411 57

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 551 16-17
5 U.S.C. 551(4) 8, 16
5 U.S.C. 551(6) 8, 16, 20
5 U.S.C. 551(8) 8, 16
5 U.S.C. 551(10) 8, 16
5 U.S.C. 551(10)(A)-(G) 16-17
5 U.S.C. 551(11) 8, 16
5 U.S.C. 551(11)(A)-(C) 17
5 U.S.C. 551(13) 8, 12, 15, 19
5 U.S.C. 554 ..... 20, 50
5 U.S.C. 556(d) 50
5 U.S.C. 557 50
5 U.S.C. 701 ..... 15, 23
5 U.S.C. 701-706 ..... 3, 12, 16, 25
5 U.S.C. 701(a)(2) 2, 8, 10, 13, 16, 23, 24, 26, 45
5 U.S.C. 701(b)(2) 15
5 U.S.C. 702 15
5 U.S.C. 703 57
5 U.S.C. 704 ..... 2, 9, 11, 14, 21, 37, 49, 51, 54, 56
5 U.S.C. 705 55
5 U.S.C. 706 56
5 U.S.C. 706(2)(A)-(F) 56
5 U.S.C. 706(2)(D) 57
All Writs Act, 28 U.S.C. 1651 59

Statutes, regulations and rule—Continued — Page

Clayton Act, 15 U.S.C. 21 *et seq.*:

Section 2(a), 15 U.S.C. 13(a) 32
Section 2(d), 15 U.S.C. 13(d) 32
Section 11, 15 U.S.C. 21 ..... 31, 32
Section 11(b), 15 U.S.C. 21(b) 34

Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*:

Section 3, 15 U.S.C. 43 32
Section 5, 15 U.S.C. 45 .....2, 25, 32, 34, 39, 43, 55
Section 5(a), 15 U.S.C. 45(a) 3, 4
Section 5(b), 15 U.S.C. 45(b) .....*passim*
Section 5(c), 15 U.S.C. 45(c) 3, 15, 27, 50, 55, 56, 57, 58
Sections 5(g)-(j), 15 U.S.C. 45(g)-(j) 50
Section 5(*l*), 15 U.S.C. 45(*l*) 50
Section 6, 15 U.S.C. 46 32
Section 9, 15 U.S.C. 49 32
Section 11, 15 U.S.C. 51 32
Section 13(b), 15 U.S.C. 53(b).....34, 42, 43
Section 17, 15 U.S.C. 56(b) 34

Fur Products Labeling Act, 15 U.S.C. 69f 34

Interstate Commerce Act, 49 U.S.C. 1 *et seq.*:

49 U.S.C. 8, 9 43
49 U.S.C. 13(1) 43

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(b)(4)(D), 29 U.S.C. 158 (b)(4)(D) 20

Statutes, regulations and rule—Continued	Page
Section 10(c), 29 U.S.C. 160(c)	39
Section 10(k), 29 U.S.C. 160(k)	19
Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.*:	
15 U.S.C. 70a	34
15 U.S.C. 70f	34
15 U.S.C. 70i(b)	34
Wool Products Labeling Act, 15 U.S.C. 68 *et seq.*:	
15 U.S.C. 68e(b)	34
15 U.S.C. 68h	34
7 U.S.C. 9	34
7 U.S.C. 193	34
7 U.S.C. 292	34
15 U.S.C. 77j(b)	34
15 U.S.C. 77t(b)	34
15 U.S.C. 78u(d)	34
15 U.S.C. 1195(a)	34
42 U.S.C. 300h-3(c)	34
42 U.S.C. 300j(e)(3)	34
42 U.S.C. 405(g)	53
42 U.S.C. 1973aa-2, 5309(c)	34
Pub. L. No. 95-473, 92 Stat. 1449, 49 U.S.C. 11701(b)	43
16 C.F.R. 3.11	28
16 C.F.R. 3.41	50
16 C.F.R. 3.52	50
Fed. R. Civ. P. 11	34

Miscellaneous: Page

Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) 16, 37
Attorney General's Manual on the Administrative Procedure Act (1947) 16, 21, 37
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 16
G. Henderson, *The Federal Trade Commission* (1924) 31
51 Cong. Rec. 12624 (1914) 30
Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968) 26
S. Rep. No. 597, 63d Cong., 2d Sess. (1914) 36
S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 16

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-900

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 53-66) is reported at 596 F.2d 1381. The order of the district court (Pet. App. 1a-2a) is not reported. The order of the Commission denying respondent's motion to dismiss the complaint (Pet. App. 27a-28a) is not reported. The order of the Commission denying respondent's motion for reconsideration (Pet. App. 29a-31a) is reported at 83 F.T.C. 1759.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1979. A petition for rehearing en banc was denied on August 6, 1979 (Pet. App. 23a-24a). On October 29, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 10, 1979. The petition was filed on December 10, 1979, and was granted on February 25, 1980 (A. 67). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's deliberative process prior to issuing a facially valid administrative complaint stating that it has "reason to believe" that certain firms are engaged in unfair methods of competition, with supporting allegations, is "agency action * * * committed to agency discretion by law" and thus not subject to judicial review under 5 U.S.C. 701(a)(2).

2. If the Commission's decision to issue an administrative complaint is not "committed to agency discretion by law," whether that decision constitutes "final agency action" (5 U.S.C. 704) subject to immediate judicial review during the pendency of the ensuing administrative proceeding.

STATUTES INVOLVED

Pertinent portions of Section 5 of the Federal Trade Commission Act ("FTC Act") (15 U.S.C. 45) and

the judicial review provisions of the Administrative Procedure Act ("APA") (5 U.S.C. 701-706) are set forth at Pet. App. 25a-26a.

STATEMENT

Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a), empowers and directs the Federal Trade Commission to prevent unfair methods of competition, and unfair and deceptive acts or practices in or affecting commerce. Section 5(b) of the Act, 15 U.S.C. 45(b), provides that the Commission may issue complaints whenever it "shall have reason to believe" that an enterprise has been or is using unfair methods of competition or unfair and deceptive acts and practices, and "if it shall appear to the Commission that a proceeding in respect thereof would be to the interest of the public." If, after hearings upon a complaint giving notice of alleged violations, the Commission finds that a respondent has engaged in unfair or deceptive acts or practices, it may issue a cease and desist order remedying the violation. Such orders do not become operative until they are finally sustained on judicial review, or the time for seeking review has expired. 15 U.S.C. 45(c).[1]

---

[1] Persons required by the Commission's order to cease and desist particular acts or practices may, within sixty days after the order has been issued, petition the appropriate court of appeals for judicial review. The court of appeals' decision is subject to review by this Court on petition for a writ of certiorari. 15 U.S.C. 45(c).

A. Proceedings Before the Commission

On July 18, 1973, the Commission, through its Secretary, issued a certified administrative complaint (J.A. 19-27) charging that respondent Standard Oil Company of California ("SOCAL") and seven other major oil companies were engaged in unfair methods of competition, in violation of 15 U.S.C. 45(a), by maintaining a noncompetitive market structure and exercising monopoly power in the refining of crude oil into petroleum products. *In re Exxon Corporation, et al.*, Docket No. 8934 (*"Exxon"*). The complaint stated that the Commission had "reason to believe that the above-named respondents have violated and are now violating [15 U.S.C. 45]" and that formal adjudicatory proceedings with respect to the alleged violation would be "in the public interest" (J.A. 19-20). The complaint contained allegations describing the manner in which respondent and the other named oil companies were said to be in violation of the law (J.A. 23-26).[2] The complaint gave notice that in the

---

[2] The administrative complaint alleged, *inter alia*, that the eight respondents, including SOCAL, engaged in the following acts and practices (J.A. 23-24): adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil; entering into numerous processing arrangements with independent refiners thereby limiting the availability of refined petroleum products to independent marketers; keeping profits at the crude level artificially high and at the refining level artificially low, thereby raising entry barriers to refining; refusing to sell gasoline and other refined petroleum products to independent marketers; and avoiding

event the Commission should conclude from the record developed in an adjudicative proceeding that the respondents are in violation of Section 5, as alleged, the Commission "may order such relief as is necessary or appropriate in order to correct or remedy the effects of anti-competitive practices engaged in by respondents and to restore competition in the relevant market or markets" (J.A. 27).

In January 1974, respondent filed a motion to dismiss the administrative complaint, contending that the Commission had issued the complaint in response to congressional pressure and without "reason to believe" that a violation had occurred and, further, that the proceeding was not in the public interest. The Commission denied the motion to dismiss (Pet. App. 27a). It also denied a motion for reconsideration, on the ground that "[o]nce the Commission has resolved [the "reason to believe" and

---

price competition in the marketing of refined petroleum products.

The administrative complaint further alleged that the respondents' acts and practices have had, among others, the following effects (J.A. 24-25): artificial price levels in the petroleum industry; increased barriers to entry into the refining of petroleum products; lessening of actual and potential competition; shortages of petroleum products in areas of the nation where independent refiners and marketers are located, thus eliminating price competition and resulting in the closing or curtailing of independent retail operations; increased profits for the respondents in excess of profits obtainable in a competitively structured market; and higher consumer prices than would be payable in a competitively structured market.

"public interest"] questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter" (Pet. App. 30a).[3]

Following the denial of respondent's motions, the administrative proceeding went forward. The proceeding is still pending.

B. Proceedings in the Courts Below

On May 1, 1975, respondent filed a civil action in the United States District Court for the Northern District of California, seeking an order compelling dismissal or withdrawal of the Commission's administrative complaint (J.A. 3-18).[4] Respondent alleged that at the time it authorized the issuance of the complaint the Commission did not possess facts suf-

---

[3] The Commission noted that both the adequacy of its determination that there is "reason to believe" that a violation of law has occurred and its belief that an adjudicatory proceeding is in the "public interest" are matters "that go to the mental processes of the Commissioners" and thus are not reviewable by the courts (Pet. App. 30a). In addition, the Commission observed that none of the communications received from members of Congress prior to the issuance of the complaint "is even remotely of the character deemed improper by the courts" (*id.* at 29a-30a, citing, *e.g.*, *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966)).

[4] The district court complaint named the Commission and its individual members as defendants.

ficient to support a reasonable belief that respondent had violated the law; that the Commission did not reasonably consider the facts in issuing the complaint; and that the Commission's initiation of administrative proceedings was the result of improper consideration of congressional pressure and legally irrelevant political and economic factors (J.A. 15).[5]

The Commission moved to dismiss the action (J.A. 50). The district court concluded that the issuance of the administrative complaint by the Commission was not subject to judicial review (J.A. 51-52) and, accordingly, granted the Commission's motion to dismiss (Pet. App. 1a-2a).[6]

---

[5] The evidence cited in support of respondent's complaint consisted mainly of: (1) the allegedly minimal use of compulsory process directed at SOCAL during the Commission's investigation preceding the issuance of the complaint; (2) the coincidence of the *Exxon* complaint with congressional inquiries into the Commission's activities regarding the petroleum industry; (3) the inclusion of standard cautionary language in a preliminary staff report requested by a member of Congress and in the Commission's letter accompanying the report; and (4) the amount of discovery requested by counsel supporting the complaint and counsel's unwillingness to limit proposed witnesses or evidence to persons or documents designated prior to completion of discovery (J.A. 6-15).

[6] At the conclusion of oral argument, the district judge stated: "I am in agreement with the suggestion of government counsel that a review of preliminary decisions made by administrative agencies, except under the most unusual circumstances, would be productive of nothing more than chaos" (J.A. 52).

A divided panel of the court appeals vacated the judgment of dismissal and remanded the case to the district court for further proceedings. The court rejected the Commission's contention that issuance of the complaint is not "agency action" as defined in the Administrative Procedure Act (5 U.S.C. 551 (13)).[7] It held that the APA's definition is illustrative, not exclusive; that courts must presume the availability of judicial review under the APA unless Congress clearly indicates otherwise; and that because almost any act an agency takes can be "agency action," the proper question is whether the act in question "is reviewable agency action" (J.A. 56-57).

Turning to consider whether the Commission's issuance of an administrative complaint is a matter "committed to agency discretion by law" (5 U.S.C. 701(a)(2)), the court acknowledged that "a determination by the Commission that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court" under the APA (J.A. 58). Nevertheless, it ruled that judicial review is available with respect to whether the Commission had in fact made the

---

[7] 5 U.S.C. 551(13) provides:

> "[A]gency action includes the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act."

The enumerated terms are defined in the following subsections of Section 551: (4) "rule"; (6) "order"; (8) "license"; (10) "sanction"; and (11) "relief".

requisite "reason to believe" determination, notwithstanding the recitation on the face of the administrative complaint that such a determination had been made (J.A. 59). The court viewed the "reason to believe" provision of 15 U.S.C. 45(b) as restricting the Commission's exercise of discretion to issue administrative complaints, and concluded that this restriction provides "law to apply" (*Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971)) to the Commission's action in issuing the complaint in question.

The court also concluded (J.A. 60-61) that the issuance of the administrative complaint constituted " 'final agency action' * * * for which there is no adequate remedy at law," and that such action is immediately reviewable in the district court under 5 U.S.C. 704. It reasoned that respondent had already exhausted its administrative remedies by raising its claim before the Commission. Moreover, it ruled that if respondent's claim were not subject to review at this stage of the proceeding it might never be reviewed, for three reasons: (1) in the event that respondent were to prevail in the administrative proceeding, its challenge to the issuance of the complaint would be moot; (2) if respondent sought to raise its claim upon review of a final cease and desist order, the record of the administrative proceedings in all likelihood would be insufficient for this purpose because the Commission's rejection of respondent's claim

would have foreclosed respondent from developing relevant facts; and (3) a court reviewing a cease and desist order is limited to considering whether substantial evidence supports the order and does not review alleged defects in the filing of a complaint (J.A. 61). The district court was directed to determine on remand whether the Commission made a "reason to believe" determination or "whether the complaint was issued solely because of outside pressure or with complete absence of a 'reason to believe' determination" (J.A. 60).

Judge Carter dissented (J.A. 61-66), on the ground that the Commission's action initiating an administrative proceeding is in essence an exercise of prosecutorial discretion and, as such, is exempted from judicial review under 5 U.S.C. 701(a)(2) (J.A. 62-63).[8] He noted that judicial inquiry into whether the Commission in fact made a "reason to believe" determination would improperly require the courts to probe the mental processes of the Commissioners (J.A. 63). Even assuming that respondent's claim may ultimately be subject to review, Judge Carter concluded (J.A. 64-66) that it is not reviewable while the administrative proceeding remains pend-

---

[8] Judge Carter noted that in rare cases judicial inquiry may be permitted into whether the prosecutor's conduct falls outside the range of his discretion, but concluded that no such facts have been pleaded by respondent in this case (J.A. 63).

ing, since the issuance of an administrative complaint is merely a preliminary determination and is not "final agency action" within the meaning of 5 U.S.C. 704. In addition, he observed (J.A. 66) that respondent had failed to make a showing of "irreparable injury" necessary to overcome the rule requiring exhaustion of administrative remedies before judicial review may be sought. He predicted that under the majority ruling, "there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function" (J.A. 64).[9]

[9] The instant action is one of several cases seeking judicial review of the *Exxon* administrative proceeding. For example, in *Standard Oil (Ind.)* v. *FTC*, 475 F. Supp. 1261 (N.D. Ind. 1979), appeal dismissed, No. 79-448 (7th Cir. Dec. 5, 1979), other respondents in the *Exxon* proceeding brought suit challenging, *inter alia*, the Commission's "reason to believe" determination. *Id.* at 1269. The district court followed the Ninth Circuit's decision in the instant case and held that "the question of whether in fact a 'reason to believe' determination was made is reviewable * * *." *Id.* at 1270. The court concluded, however, that "the record indicates that the Commission did honor its statutory obligations" in issuing the administrative complaint. *Ibid.*

SUMMARY OF ARGUMENT

I

A. The Federal Trade Commission's decision to issue an administrative complaint instituting adjudicative proceedings against SOCAL is not judicially reviewable because it does not constitute "agency action" within the meaning of the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701-706. The contrary decision of the court of appeals threatens disruption of the administrative process by permitting respondents in administrative proceedings to delay or impede those proceedings by seeking relief in the courts with respect to preliminary procedural matters. The Administrative Procedure Act was not intended to alter prior case law that establishes that preliminary orders such as those setting matters for hearing, are not independently reviewable in the courts.

None of the terms included in the definition of "agency action" (5 U.S.C. 551(13)) is remotely comparable to the issuance of an administrative complaint initiating an adjudicative proceeding. Only actions that have some dispositive effect on rights, privileges, duties or liabilities constitute reviewable "agency actions." The issuance of a complaint is not dispositive of anything because it has no "determinate consequences for the party to the proceeding." *ITT* v. *Local 134, IBEW*, 419 U.S. 428, 443 (1975).

B. Even if the Commission's decision to issue a complaint is "agency action," it nevertheless is "committed to agency discretion by law" and therefore

is exempted from judicial review by 5 U.S.C. 701 (a)(2). The court of appeals erroneously concluded that the "reason to believe" language in Section 5 (b) of the FTC Act imposes a substantive restriction on the Commission's discretion to issue complaints and that therefore the discretionary function exception of Section 701(a)(2) does not preclude the courts from considering the question whether the Commission in fact made a "reason to believe" determination prior to issuing the complaint. As the language, structure and legislative history of Section 5(b) demonstrate, however, for purposes of judicial review there is no meaningful distinction between the Commission's making a "reason to believe" determination that "unfair" methods of competition or acts and practices are being used, and the legal adequacy of the factual allegations in the complaint providing the reasons in support of that belief. If, as the court of appeals correctly held, the factual basis for the "reason to believe" determination is not reviewable, it follows that the deliberative process by which the Commission reaches that determination is also exempted from judicial review.

The discretion exercised by the Commission in deciding whether or not to institute an adjudicative proceeding is analogous to the discretion exercised by a prosecutor in deciding whether or not to bring criminal charges. Cases in both the criminal and administrative contexts support the conclusion that the exercise of such discretion is generally not subject to review.

Indeed, review of the Commission's decision to issue an administrative complaint would require the courts to go behind a certified and facially valid complaint to probe the mental processes of the Commissioners. The very nature of this inquiry suggests that the decision whether or not to institute proceedings is not an appropriate matter for the courts to review.

The traditional deference accorded to prosecutorial discretion and the reluctance of the courts to inquire into the deliberations of government officials reflects a strong presumption of regularity in the processes of government. The allegations in respondent's district court complaint are patently insufficient to overcome the strong presumption of regularity that attaches to the Commission's actions here.

II

Assuming arguendo that the Commission's decision to initiate a proceeding by issuing a complaint is "agency action" and thus ultimately reviewable, the court of appeals erred in holding it "final" agency action immediately reviewable in the district court while the administrative proceeding is still pending. The issuance of a complaint is merely the preliminary step in the administrative process and in no sense can be deemed "final" under 5 U.S.C. 704. The finality requirement of that section incorporates the requirement that, absent irreparable injury, a party must exhaust its administrative remedies before seeking relief in the courts. Here, respondent has neither exhausted its administrative remedies nor is it suffering irreparable injury by virtue of having to re-

spond in the administrative proceeding. In 15 U.S.C. 45(c) Congress provided an adequate remedy by authorizing review in the court of appeals of any final cease and desist order that the Commission may issue at the conclusion of the administrative proceeding. The court below erred in ignoring that statutory procedure.

ARGUMENT

I. THE FEDERAL TRADE COMMISSION'S ISSUANCE OF AN ADMINISTRATIVE COMPLAINT STATING ITS REASONS TO BELIEVE THAT THE RESPONDENTS ARE ENGAGED IN UNFAIR METHODS OF COMPETITION IS AN EXERCISE OF AGENCY DISCRETION NOT SUBJECT TO JUDICIAL REVIEW

A. The Decision to Issue an Administrative Complaint Is Not "Agency Action" Within the Meaning of 5 U.S.C. 701.

Under the Administrative Procedure Act, only "[a] person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. The term "agency action", as used in the judicial review provisions of the APA, is defined in 5 U.S.C. 551(13): " 'agency action' includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act * * *." [10] None of the terms included in the defini-

---

[10] 5 U.S.C. 701(b)(2) expressly provides that for the purpose of the judicial review provisions of the APA, " 'agency action' [has] the meaning[] given [it] by section 551 of this

tion of agency action, and none of their equivalents, is even remotely comparable to the administrative step of issuing a complaint initiating a proceeding before an agency. See 5 U.S.C. 551(4), (6), (8), (10), (11).[11]

---

title." The definition of "agency action" in Section 551 was intended to bring together terms defined elsewhere in that section in order to simplify the judicial review provisions of Sections 701-706. See S. Rep. No. 752, 79th Cong., 1st Sess. 11 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 21 (1946); *Administrative Procedure Act, Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 197-198, 255 (1946).

[11] 5 U.S.C. 551 defines these terms as follows:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate, or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing;
>
> (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
>
> (8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;
>
> (10) "sanction" includes the whole or a part of an agency—
>
> > (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
> >
> > (B) withholding of relief;

The court of appeals nevertheless concluded (J.A. 56-57) that issuance of the administrative complaint by the Commission constituted agency action because, it said, the statutory definition of agency action is merely illustrative, there is a presumption that judicial review is available under the APA, and almost any act an agency performs can be agency action. The court therefore concluded that the relevant question was not whether the issuance of the complaint was agency action but whether it was "reviewable" agency action under the APA. We submit that this analysis is flawed in several respects.

First, other courts that have focused on the definition of agency action in the Administrative Procedure Act have properly concluded that it "is not a general term with the all-embracing meaning usually

---

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person.

conveyed by those words * * *." *Hearst Radio, Inc.* v. *FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948). Thus, "not every 'action' or activity undertaken by an agency constitutes 'agency action' within the statutory context." *Pharmaceutical Mfrs. Ass'n* v. *Kennedy*, 471 F. Supp. 1224, 1226 (D. Md. 1979). See *Hearst Radio, Inc.* v. *FCC, supra; In re FTC Corporate Patterns Report Litigation*, 1977-2 Trade Cas. (CCH) ¶ 61,544, at 72,143-72,145 (D. D.C. 1977), aff'd *sub nom. Appeal of FTC Line of Business Litigation*, 595 F.2d 685 (D.C. Cir.), cert. denied, 439 U.S. 958 (1978).[12] See also *ITT* v. *Local 134, IBEW*, 419 U.S. 428, 441-448 (1975).

Second, the court of appeals begged the question by asserting that the term "agency action" must be defined in light of the recognized presumption in favor of judicial review under the Administrative Proce-

---

[12] The activities held not to constitute "agency action" in the cited cases were issuance of a publication containing an alleged libel (*Hearst*); publication of nonproprietary information identifying generic drugs (*Pharmaceutical Mfrs.*); issuance of orders to file reports containing financial data (*Corporate Patterns Report*). For other cases holding that particular acts are not "agency action," see, *e.g.*, *National Ornament & Electric Light Christmas Ass'n* v. *CPSC*, 526 F.2d 1368, 1372-1373 (2d Cir. 1975) (sending volunteers to inspect stores' stock and warn of possibly unsafe lights); *Public Utilities Comm'n* v. *United States*, 356 F.2d 236 (9th Cir. 1966) (FCC conference with carrier); *Friends of Yosemite* v. *Frizzell*, 420 F. Supp. 390, 394 (N.D. Cal. 1976) (memorandum disapproving of proposed action); *People for Environmental Progress* v. *Leisz*, 373 F. Supp. 589 (C.D. Cal. 1974) (Forest Service program to spray weed killer).

dure Act. Obviously, any such presumption cannot apply until there has been "agency action" to review. See, *e.g.*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

Finally, the court's unprecedented notion that "almost any act an agency takes can be 'agency action'" (J.A. 57) is plainly inconsistent with the language of the statute and would drastically alter its effect. No matter how "inclusive" the definition in Section 551(13) may be, it is clear from the words used that only actions having some dispositive effect on rights, privileges, duties or liabilities constitute judicially reviewable "agency actions." Unlike the examples of "agency action" provided in Section 551(13), issuance of an administrative complaint does not require the respondent to do or refrain from doing anything, save respond; it does not "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). See *United States* v. *Los Angeles & Salt Lake R.R. Co.*, 273 U.S. 299, 309-310 (1927); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938).

A case illustrating this principle, even though the Court there applied it in a very different context from the present one, is *ITT* v. *Local 134, IBEW*, *supra*. That case involved a preliminary administrative determination by the National Labor Relations Board, pursuant to 29 U.S.C. 160(k), relating to con-

duct allegedly constituting an unfair labor practice (~~including~~ inducing employees to strike in hopes of forcing an employer to assign particular work to employees in a particular union, in violation of 29 U.S.C. 158(b)(4)(D)). The Court held that the NLRB's preliminary administrative determination was not an "order" (5 U.S.C. 551(6)) making the procedural safeguards of 5 U.S.C. 554 applicable to the proceedings leading up to that determination. The Court noted that "the Section 10k decision standing alone binds no one" (419 U.S. at 444, quoting *NLRB* v. *Plasterer's Union*, 404 U.S. 116, 126 (1971)) and thus is not itself the whole or a part of a "final disposition" within the meaning of the term "order" as defined in the APA.[13] Here, too, the Commission's issuance of the administrative complaint, embodying its determination that there is "reason to believe" that SOCAL violated the law is not a final disposition; on the contrary, it is merely a preliminary step that signals the commencement of an adjudicatory proceeding, and has no binding effect on the parties to that proceeding.

This distinction between preliminary determinations and conclusive dispositions was properly recognized by the District of Columbia Circuit in *Gifford-Hill & Co.* v. *FTC*, 523 F.2d 730, 732 (D.C. Cir. 1975). In that case the respondent in an FTC proceeding sought to nullify the administrative complaint

---

[13] The Court rejected the contention that "an intermediate proceeding within an agency is necessarily a 'part' of a 'final order' * * *." 419 U.S. at 443.

on the ground that the Commission's determination to issue it had been made without compliance with the procedures required by the National Environmental Policy Act. The court concluded, *inter alia*, that the decision to institute an adjudicatory proceeding is not an "agency action" subject to judicial review under the APA.

The decision below—permitting respondent to file an action in the district court to prevent the adjudicative proceeding from going forward—threatens the integrity of the administrative process and is based on a distorted view of the Administrative Procedure Act's provisions for judicial review. The Administrative Procedure Act was not intended to give parties to an agency proceeding an opportunity to block that proceeding at its outset by seeking relief in the courts. On the contrary, the APA (specifically, 5 U.S.C. 704) preserves the rule established in this Court's prior cases that preliminary orders, such as orders setting matters for hearing, are not reviewable, either directly, or collaterally, through suits for injunctive or declaratory relief. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540 (1946); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). See *Attorney General's Manual on the Administrative Procedure Act* 103 (1947).

Under 5 U.S.C. 704 "a preliminary procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." Hence the Act confers a right on a person adversely affected or ag-

grieved by a final agency action to contest in a reviewing court, at the proper time (see point II, *infra*), any alleged prejudicial error in a preliminary or intermediate ruling by the agency. But this does not mean that such rulings are ever independently reviewable—even after the agency proceeding has concluded—at the behest of a person who has not been adversely affected by an "agency action" within the meaning of the APA's authorization of judicial review. In other words, there are steps in the administrative process that are not subject to judicial review under the APA at all, except to the extent that they may have contributed to an adverse agency disposition of the matter.

In short, the issuance of a complaint initiating an adjudicatory proceeding is not dispositive of anything because it has no "determinate consequences for the party to the proceeding." *ITT* v. *Local 134, IBEW*, *supra*, 419 U.S. at 443.[14] Accordingly, the Commission's issuance of the administrative complaint against SOCAL and the agency's prior deliberative

---

[14] Of course, dispositive effects are not limited to formal agency action—they may occur in informal action (or inaction) that is the equivalent of a final disposition. See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 318 (1979) (disclosure affecting property rights); *Independent Broker-Dealers' Trade Ass'n* v. *SEC*, 442 F.2d 132, 137-142 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971) (agency's statement of policy having substantial effect on business held to be equivalent to rulemaking); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856, 863-864 (4th Cir. 1961) (agency proceedings unreasonably delayed). See also the district court's discussion in *In re FTC Corporate Patterns Report Litigation*, *supra*, 1977-2 Trade Cas. (CCH) at 72,144-72,145.

process do not constitute "agency action" and thus are not judicially reviewable under the APA, just as they are not subject to review in a suit for an injunction or a declaratory judgment.

B. If Issuance of An Administrative Complaint is "Agency Action," it is Within The Discretionary Function Exception of 5 U.S.C. 701(a)(2).

Even assuming that the decision to issue a complaint pursuant to Section 5(b) of the FTC Act is an "agency action," it nevertheless is an action "committed to agency discretion by law" and therefore is excepted from judicial review by 5 U.S.C. 701(a)(2). In holding otherwise, the court of appeals concluded that, for purposes of judicial review under 5 U.S.C. 701, there are two distinct aspects of "agency action" subsumed in the Commission's issuance of an administrative complaint—(1) the substantive "merits" of the "reason to believe" determination itself, and (2) whether the Commission in fact made a "reason to believe" determination that the law had been violated. As to the former, the court correctly held that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and [is] not reviewable in the district court under the APA" (J.A. 58). The court concluded as to the latter, however, that the "reason to believe" language in Section 5(b) imposes a substantive legal restriction on the Commission's discretion to issue complaints which must be satisfied before the Commission acts; that this restriction provides "law to apply" within the meaning of *Citizens*

to Preserve Overton Park v. *Volpe*, 401 U.S. 402, 410 (1971); and that the discretionary function exception of 5 U.S.C. 701(a)(2) is therefore inapplicable (J.A. 59).

This conclusion is erroneous. As the language, structure and legislative history of Section 5(b) demonstrate, for purposes of judicial review there is no meaningful distinction in the statute between the Commission's making a determination that it has "reason to believe" that unfair methods of competition or acts and practices have been or are being used by a respondent, and the legal adequacy of the factual allegations in the complaint providing the reasons in support of that belief. Moreover, the court of appeals ignored the settled principle that the initiation of administrative proceedings, like the initiation of criminal prosecutions, is a matter within the agency's discretion and is not subject to judicial review. Finally, the ruling below, if allowed to stand, would require the courts to probe the mental processes of the Commissioners, contrary to the principles established in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

1. *The Phrase "Reason to Believe" in Section 5(b) of the FTC Act Does Not Define a Judicially Enforceable Restriction on the Commission's Discretion to Initiate Cease-and-Desist Proceedings*

Although the discretionary function exception is admittedly "very narrow" (*Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 410), it places

an important limitation on judicial review by establishing a line of demarcation between those actions of executive and independent regulatory agencies that the courts may scrutinize under the legal standards set forth in 5 U.S.C. 701-706, and those that are subject exclusively to legislative oversight. The court of appeals disregarded this limitation. It avoided the discretionary function exception by treating the "reason to believe" language in Section 5(b) of the FTC Act as a substantive restriction that provides "law to apply" within the meaning of this Court's decision in *Overton Park, supra.* The court's mechanistic application of the language from *Overton Park,* without focusing on the nature of the particular administrative action involved, is inconsistent with this Court's analysis in that case (see 401 U.S. at 411-413) and with other decisions of this Court explaining when agency action involves unreviewable discretion. *E.g., Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979); *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Ass'n of Data Processing Serv. Organizations* v. *Camp*, 397 U.S. 150, 157 (1970).

"Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Barlow* v. *Collins*, 397 U.S. 159, 165 (1970). See *Morris* v. *Gressette, supra*; *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). Under these

cases, judicial review of agency action is foreclosed by 5 U.S.C. 701(a)(2) to the extent that the substantive statute reflects congressional intent to vest in the administrative agency unreviewable discretion to exercise particular functions. Determination of such an intent depends on the language, structure and legislative history of the substantive statute, and decisions under analogous statutes. See *Southern Ry.* v. *Seaboard Allied Milling Corp., supra,* 442 U.S. at 455. The court of appeals failed to undertake this necessary analysis.[15]

---

[15] The discretionary function exception contained in Section 701 (a) (2) is essentially a codification of prior case law. Before the enactment of the Administrative Procedure Act, this Court engaged in the same type of analysis in determining whether Congress intended a particular agency action to fall within the agency's unreviewable discretion. See, *e.g., Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297 (1943).

Some courts have employed a more pragmatic analysis in determining whether a discretionary agency determination is the proper subject of judicial review. See, *e.g., Natural Resources Defense Council Inc.* v. *SEC,* 606 F.2d 1031, 1043-1044 (D.C. Cir. 1979); *Greater N.Y. Hosp. Ass'n* v. *Mathews,* 536 F.2d 494, 498 (2d Cir. 1976); *Hahn* v. *Gottlieb,* 430 F.2d 1243, 1249 (1st Cir. 1970). In the absence of a clear indication of congressional purpose, these courts have focused on three factors: (1) the appropriateness of the issues raised for review by the courts; (2) the impact of review on the effectiveness of the agency in carrying out its assigned role; and (3) the need for judicial supervision to safeguard the interests of the plaintiffs. See Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 371 (1968).

Consideration of these factors in the present context strongly supports nonreviewability. Review would undermine the effective and orderly conduct of enforcement proceedings

Section 5(b) provides that "[w]henever the Commission shall have reason to believe that any * * * corporation * * * is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve * * * a complaint stating its charges *in that respect* * * *" (emphasis added).

This language is a paradigm for the grant of discretion to an agency. It assigns to the Commission alone the choice of when, and on what grounds, to act. "Reason to believe" is one of two elements relating to exercise of this discretion. The other is the appearance, to the Commission, that a remedial proceeding would be in the public interest. The public interest determination has long been held unreviewable. *Hills Bros.* v. *FTC*, 9 F.2d 481 (9th Cir.), cert. denied, 270 U.S. 662 (1926); *Jewel Companies* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970). Nothing on the face of the statute suggests that a different standard applies to the "reason to believe" element of the Commission's discretion. On the con-

---

by inviting respondents to engage in disruptive and dilatory litigation of ancillary procedural issues in the courts; the courts would be unnecessarily burdened with premature consideration of cases that ultimately may not require judicial review because the Commission may terminate the administrative proceeding without entering a cease and desist order; and if a cease and desist order is entered, the respondent may challenge the validity of that order in the court of appeals, pursuant to 15 U.S.C. 45(c).

trary, as explained in *Hills Bros.*, *supra*, "[a]n examination of the statute shows very clearly that the question whether a proceeding by the commission in respect thereof would be to the interest of the public, like the question whether the commission has reason to believe * * * is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted, and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case * * *." 9 F.2d at 483-484.

The analysis of the statute 54 years ago in *Hills Bros* correctly recognizes that the Commission's "reason to believe" and public interest determinations are embodied in the "complaint stating its charges in that respect" (15 U.S.C. 45(b)), that no other preliminary order or finding is necessary to institute an adjudicative proceeding, and that only the merits of the charges—not the preliminary determinations that led to their filing—may be litigated if and when a cease and desist order is eventually entered. Thus, the Commission determines that it has adequate "reason to believe" when, by affirmative vote, it concludes that the allegations in a proposed complaint are sufficient to warrant the initiation of an adjudicative proceeding; it then directs its Secretary to issue the complaint. See 16 C.F.R. 3.11. It follows that "reason to believe" is inextricably linked to the Commission's responsibility to decide what kinds of business conduct may be "unfair" within the meaning of the

statute. See *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244 (1972); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310-314 (1934).

The court below recognized this linkage in holding that the merits of the Commission's reason to believe determination are not subject to judicial review (J.A. 58):

> Section 5 of the Federal Trade Commission Act is a broad delegation of power by Congress to the FTC. The Act empowers the FTC to determine in the first instance whether a method of competition or an act or practice is unfair. See, *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *United States* v. *Morton Salt Co.*, * * * 338 U.S. [632] (1950) at 640-41, 70 S.Ct. 357. The necessary companion to the FTC's power to develop in the first instance the meaning of the statutory term 'unfair' is the power to determine whether there is 'reason to believe' that a party is engaged in 'unfair' conduct. Judicial intervention in this legitimate decision making process would serve only to hamper or thwart the FTC's exercise of the power granted to it by Congress.

Under the statute, there is no meaningful distinction between the factual allegations providing "reason to believe" and the question whether a "reason to believe" determination has in fact been made. If, as the court of appeals correctly held, the factual

basis for the reason to believe determination is unreviewable, it follows that the process by which the Commission reaches that determination is also insulated from judicial review.

The legislative history of Section 5(b) supports the view that Congress intended to place the Commission's issuance of an administrative complaint beyond the power of the courts to review. The "reason to believe" language was inserted into 15 U.S.C. 45 by the Senate Committee on Interstate Commerce. S. Rep. No. 597, 63d Cong., 2d Sess. (1914). The committee report did not discuss the reason to believe standard as such. But it stressed the need for "wide discretion" in the conduct of investigations to avoid hampering administration of the Act, noting that "[t]o almost every inquiry it might be possible to make specious objections which, while lacking any real merit, might effectually clog the conduct of the inquiry" (*id.* at 12).[16]

---

[16] The references in the congressional debates to the "reason to believe" standard support our position that the issuance of a complaint rests entirely in the Commission's discretion and hence is not subject to review. For example, a Senate opponent of the bill contended that the proposed Commission would be able to issue a complaint whenever a complainant "can satisfy [the Commission] or arouse their suspicion to the point that the Commission think they have reason to believe * * *." 51 Cong. Rec. 12624 (1914) (remarks of Sen. Brandegee). Another opponent of the bill observed during the debates that a complaint would be issued by the Commission "if it should be found that there was a likelihood of successful prosecutions." *Id.* at 16281 (remarks of Rep. Volstead). He regarded the issuance of the complaint

The statutory language, structure, and history of Section 5(b) together reflect an unambiguous intent to confer the widest discretion on the Commission to initiate complaints, because the Commission alone is empowered to determine in the first instance whether a method of competition or an act or practice is "unfair." The court of appeals' contrary conclusion that the making of a "reason to believe" determination is subject to statutory constraints and, hence, is judicially reviewable (J.A. 59) purports to rest upon its decision in *Hunt Foods and Industries, Inc.* v. *FTC*, 286 F.2d 803, 806 (9th Cir.), cert. denied, 365 U.S. 877 (1961).

Hunt Foods correctly held that the Commission's responsibility to ascertain the facts before issuing a complaint—reflected in the "reason to believe" language of Section 5(b) of the FTC Act and Section 11 of the Clayton Act, 15 U.S.C. 21—sustained its au-

---

as "equivalent to the bringing of a law suit" (*ibid.*). This view of the Commission's reason to believe determination was underscored by the remarks of Senator Sutherland: "when the commission have reason to believe that an unfair method of competition is being practiced, they shall bring the parties before them for an investigation" (*id.* at 12652).

Contemporaneous construction also reflects an understanding that the Commission's initiation of proceedings is not subject to review. A commentator reviewing the first decade of the Act's administration noted that no procedure existed to put in issue the sufficiency of the Commission's reasons to believe that a violation had occurred. G. Henderson, *The Federal Trade Commission* 49-50 (1924).

thority to issue investigational subpoenas prior to issuing a complaint.[17] Although the Commission's preliminary ascertainment of the facts was described by the court as a "duty" (286 F.2d at 806), that characterization does not create a judicially enforceable restriction on the Commission's power to issue complaints. For the same "duty" is preliminary to the initiation of every proceeding by the government—administrative, civil or criminal—

---

[17] *Hunt Foods* involved a subpoena issued by the Commission in aid of an investigation into possible violations of Section 5 of the FTC Act and Sections 2(a) and (d) of the Clayton Act, 15 U.S.C. 13(a) and (d). The respondent claimed that the Commission could not gather information by subpoena until it had issued a complaint. The court of appeals disagreed. It noted that both Section 11 of the Clayton Act and Section 5(b) of the FTC Act provide that complaints may be filed whenever the Commission shall have "reason to believe" that a violation has occurred. It then reasoned that "[t]he Commission cannot have 'reason to believe' unless it is in possession of facts warranting such a belief. It thus becomes the duty of the Commission to ascertain the relevant facts" (286 F.2d at 806). Since the investigational subpoena was in aid of this function, the court held that it had been properly issued under 15 U.S.C. 49, relating to subpoenas, and 15 U.S.C. 43 and 46, relating to the Commission's power to conduct investigations. The rationale of *Hunt Foods* that "reason to believe" depends upon ascertainment of the relevant facts comports with our position that "reason to believe" is shown by the factual allegations contained in the administrative complaint, and that no separate inquiry may be made into the Commission's deliberative process.

charging a violation of law or other misconduct, that may eventually result in imposition of a sanction. The duty to ascertain facts before initiating administrative proceedings is thus analogous to a grand jury's investigation prior to making a determination of probable cause. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Like a grand jury's finding of probable cause, an agency's reason to believe determination has no independent legal significance apart from the supporting factual allegations in the complaint, which must be established in the ensuing adjudicative proceeding. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 147 (1967).

In *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, this Court held that an administrative "probable cause" determination is not judicially reviewable, even when the immediate consequence of the determination is the seizure of property. The Court recognized that "[t]he harm to property and business can * * * be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts." *Id.* at 599. Cf. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 146-148; *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938).

Were the rule otherwise, numerous administrative,[18] civil[19] and criminal[20] proceedings would be delayed while the courts went behind facially valid complaints to determine whether the charging au-

---

[18] The "reason to believe" standard applies not only to Commission administrative complaints issued pursuant to Section 5 of the FTC Act and Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), but also to its attempts to obtain injunctive relief (15 U.S.C. 53(b)) or criminal penalties (15 U.S.C. 56(b)), and to its enforcement of other statutes (15 U.S.C. 68e(b), 68h (Wool Products Labeling Act); 15 U.S.C. 69f (Fur Products Labeling Act); 15 U.S.C. 70a, 70f, 70i(b) (Textile Fiber Products Identification Act).

Many other regulatory statutes provide that complaints shall be issued if the agency has "reason to believe" violations of law are occuring. *E.g.*, 7 U.S.C. 9 (Commodity Futures Trading Commission); 7 U.S.C. 193, 292 (Secretary of Agriculture); 15 U.S.C. 21(b) (enforcement of the Clayton Act by ICC, FCC, CAB, Federal Reserve Board, and FTC); 15 U.S.C. 77j(b) (SEC's authority to issue order suspending use of prospectus and institute hearings); 15 U.S.C. 1195(a) (Consumer Product Safety Commission's authority to seek injunction for violation of Flammable Fabrics Act); 42 U.S.C. 1973aa-2, 5309(c) (Attorney General's authority to bring certain civil rights enforcement actions); 42 U.S.C. 300h-3(c), 300j(e)(3) (EPA administrator's authority to seek TRO or injunction). See also 15 U.S.C. 77t(b), 78u(d) (authorizing the SEC to initiate court proceedings whenever it "appear[s] to the Commission" that violations of law are occurring).

[19] Cf. Fed. R. Civ. P. 11 (signing of pleading by attorney certifying that there is "good ground to support it").

[20] Cf. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence).

thority in fact had made a determination that it had sufficient evidence of a violation to initiate a proceeding.[21]

2. *The Issuance of an Administrative Complaint is An Exercise of Unreviewable Prosecutorial Discretion*

Discretion to institute administrative enforcement proceedings is similar to the discretion exercised by a prosecutor in bringing criminal charges. Accordingly, many of the reasons that militate against judicial review of prosecutorial discretion in the criminal area also apply to judicial review of decisions of agencies to issue administrative complaints. In the criminal area, it is settled that "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).[22] The decision as to when to bring criminal charges is also one within the prosecutor's discretion. See *United States* v. *Lovasco*, 431 U.S. 783 (1977).

---

[21] For this and other reasons, the general counsels of five agencies have expressed concern to the Solicitor General about the harmful implications of the court of appeals' decision in this case. See Pet. App. 32a-43a.

[22] That discretion, of course is subject to constitutional limits on its exercise. *Bordenkircher* v. *Hayes, supra*, 434 U.S. at 365. Thus a claim that a respondent in an administrative proceeding was singled out on the basis of an unjustifiable standard such as race or religion would serve as a proper basis for seeking judicial review of a final cease and desist order.

Administrative agencies have similarly broad discretion in initiating adjudicative proceedings.[23] As Judge Carter observed below (J.A. 62-63):

> * * * [J]udicial review of prosecutorial discretion in the administrative area is generally rejected, whether the agency's decision is for prosecution (*e.g.*, *Miles Laboratories Inc.* v. *FTC*, 50 F.Supp. 434 (D.D.C. 1943), *affirmed*, 78 U.S. App. D.C. 326, 140 F.2d 683, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 83 L.Ed. 1582 (1944); *Hills Bros.* v. *FTC*, 9 F.2d 481 (9 Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926)), or whether the agency's decision is against prosecution (*e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (NLRB) (dictum); *Kixmilier* v. *SEC*, 160 U.S. App. D.C. 375, 379, 492 F.2d 641, 645 (1974)).
>
> In such cases the regularity of prosecutorial discretion is generally assumed. Only the most unusual and compelling circumstances, which must be specially pleaded, will permit inquiry into whether the prosecutor's conduct falls outside the discretion permitted to him and be subject to review. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States* v. *Steele*, 461 F.2d 1148 (9 Cir. 1972). No such facts are pleaded in this case.

See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) (NLRB General Counsel has un-

---

[23] In *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958), this Court recognized that "the [Federal Trade] Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

reviewable discretion to decide whether or not to issue an unfair labor practice complaint.[24]); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, *supra* (ICC has unreviewable discretion whether to suspend or investigate a railroad tariff); *Morris* v. *Gresette*, *supra* (Attorney General has unreviewable discretion whether to object to a state's change in election laws under the Voting Rights Act). The Commission's exercise of "prosecutorial" discretion in initiating adjudicative proceedings is equally as broad.[25]

---

[24] This unreviewable discretion is confirmed in the legislative history of the APA. Section 10(c) of that Act, now 5 U.S.C. 704, provided that "every agency action made reviewable by statute and every final agency action for which there is no adequate remedy in Court shall be subject to judicial review." It was objected "that this section read in the light of the definition of agency action in subsection (g) of section 2 would enable courts to review the failure of an agency to institute proceedings in labor cases. The point is made that out of the numerous complaints and requests received the responsible agency must have discretion to choose what shall be set down for proceedings. The answer however, is that the introductory clause of section 10 expressly exempts agency action * * * committed by law to agency discretion." *Administrative Procedure Act, Legislative History*, *supra*, S. Doc. No. 248 at 38; see also *id.* at 229-230. See *Attorney General's Manual on the Administrative Procedure Act* 95, 136 (1947).

[25] Respondent asserts (Br. in Opp. 14-15 n.10) that in both *Southern Railway* and *Morris* v. *Gressette*, other avenues of judicial review were available to the aggrieved parties. But it was Congress, not the courts, that created those alternative avenues for review. Surely respondent does not suggest that the courts are obligated to fashion new forms of relief to accommodate every party whose claims would otherwise be unreviewable, even where it appeared that Congress did not intend to permit such review.

A comparison of this case with *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), underscores our contention that the issuance of the Commission's complaint is an exercise of prosecutorial discretion beyond the power of the courts to review. In *Bachowski* the Court held that a decision by the Secretary of Labor not to bring a civil action under the Labor-Management Reporting and Disclosure Act of 1959 (L-MRDA) to set aside an allegedly invalid union election was subject to limited judicial review at the behest of parties protected by that Act. This Court (421 U.S. at 567 n. 7) adopted that portion of the Third Circuit's opinion (*Bachowski* v. *Brennan*, 502 F.2d 79, 86-88 (1974)) which rejected the Secretary's contention that his decision was an unreviewable exercise of prosecutorial discretion.

The Third Circuit in *Bachowski* held that "the doctrine of prosecutorial discretion should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interest, rather than the protection of individual rights." 502 F.2d at 87. The Court noted that "in seeking to remedy violations of the [L-MRDA] the Secretary acts not only for the benefit of the country as a whole, but also on behalf of those individuals whose rights have been infringed. To grant the Secretary absolute discretion in this situation seems particularly inappropriate, for if he wrongfully refuses to file suit, individual union members are left without a remedy." 502 F.2d at 87-88 (footnote omitted). The Third Circuit concluded that the Sec-

retary's reviewable authority under the L-MRDA was distinguishable from the unreviewable authority of the General Counsel of the National Labor Relations Board to refuse to institute an unfair labor practice complaint, because under Section 10(c) of the National Labor Relations Act, " '[t]he public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies.' " 502 F.2d at 87 n. 11, quoting *Vaca* v. *Sipes*, 386 U.S. 171, 182 n. 8 (1967).

Similarly, the principal concern of the Federal Trade Commission in initiating adjudicative proceedings pursuant to Section 5(b) of the FTC Act is not the vindication of private rights but whether particular unfair acts or practices have been harmful to the public interest. In *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929), the Court confirmed that "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." Thus, it is clear that under *Klesner* complaining consumers and competitors disappointed by the Commission's failure to initiate an adjudicative proceeding have no right to judicial review into whether the Commission made an independent "reason to believe" determination with respect to their grievance. There is no reason for a different standard when a complaint is issued, rather than refused.[26]

---

[26] In *Klesner* the Court declined to enforce the Commission's cease and desist order because it concluded that the record developed at the adjudicative proceeding showed that

Respondent relies (Br. in Opp. 9) upon language in *Schilling* v. *Rogers*, 363 U.S. 666 (1960)[27] that suggests that judicial review may be available where "it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers * * *." *Id.* at 676-677, citing *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) and *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Neither *Accardi* nor *Leedom* involved the reviewability of a decision to initiate administrative proceedings.

In *Accardi*, an alien alleged that his name was included in a list of "unsavory characters" whom the Attorney General planned to deport and that the list was circulated to the members of the Board of Immigration Appeals prior to their decision denying the alien discretionary relief from deportation. The Court observed that the facts as alleged were sufficient to warrant judicial review of the Appeal

---

the controversy was private in character. 280 U.S. at 30. Nothing in *Klesner* suggests that a cease and desist order should be set aside if the administrative proceeding develops evidence of violations contrary to the public interest that were not known when the complaint was filed. By the same token, we submit that a cease and desist order supported by sufficient evidence of a violation is not subject to challenge on the ground that the Commission failed to make a "reason to believe" determination at the outset of the proceeding.

[27] In *Schilling*, the Court concluded, after examining the terms and history of the Trading with the Enemy Act, that the refusal of the alien property custodian to return vested property was not reviewable despite a "congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive * * *." 363 U.S. at 675.

Board's failure to exercise its discretion "where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding." 347 U.S. at 267. Here, of course, in contrast, Senator Jackson, who allegedly communicated with the Commission prior to the filing of the complaint (J.A. 7), was a single member of an entirely separate branch of government. Respondent has never even alleged that Senator Jackson expressed to the Commission any opinion regarding the issuance of an administrative complaint. Moreover, absent judicial review, the Board's failure to act in *Accardi* would have resulted in immediate deportation of the alien. In contrast, the Commission's "reason to believe" determination has no legal consequence beyond the institution of administrative proceedings. Compare *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 598.

Leedom involved a decision by the National Labor Relations Board to include professional employees in a collective bargaining unit without first determining, as required by statute, whether a majority of the professional employees would vote for inclusion in such a unit. The Court held that the Board's violation of an express statutory prohibition deprived the professional employees of a right provided by Congress, and that judicial review was available to prevent deprivation of that private right. The Court, however, was careful to distinguish between express statutory prohibitions, and affirmative declarations of duty.

> While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable, in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. * * * If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose * * *.

358 U.S. at 189, quoting *Texas & New Orleans R.R. Co.* v. *B'hd. of Railway & Steamship Clerks*, 281 U.S. 548, 568 (1930). Unlike the statute involved in *Leedom*, Section 5(b) of the FTC Act, authorizing the Commission to issue administrative complaints, is, at most, an "affirmative declaration of duty" directed at vindicating the public interest (see *FTC* v. *Klesner*, *supra*), and does not impose any enforceable restriction on the Commission's exercise of authority.[28]

---

[28] Nor can respondent draw support from Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b) (Br. in Opp. 13). That Section provides that the Commission may seek a preliminary injunction in the district court "[w]henever the Commission has reason to believe" (1) that a violation of any provision of law enforced by the Commission is occurring or is about to occur; and (2) that it would be in the public interest to enjoin the alleged violation "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review * * *." The district court may grant such an injunction only "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest * * *."

No court has ever held that the Commission's decision to seek a preliminary injunction is reviewable on the ground that the Commission failed to make a "reason to believe"

Respondent contends (Br. in Opp. 15) that if the Commission has unreviewable discretion to issue a complaint, it might do so solely for political reasons even if it had no basis whatever for believing that a respondent had violated the law. This is not a proper

---

determination that a violation was occurring or was about to occur. Instead, in determining whether to grant relief under Section 13(b), the courts have focused on whether the Commission has met its burden of showing the likelihood of ultimate success on the merits. See *FTC* v. *National Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979). Obviously, if the Commission fails to support the allegations reflecting its "reason to believe," it has not shown that success on the merits is likely, and the district court must therefore deny the injunction. See *FTC* v. *British Oxygen Co.*, 529 F.2d 196, 199 (3d Cir. 1976) (en banc). Even where an injunction has been denied, however, Section 13(b) does not authorize the district court either to review the Commission's subsequent determination to issue an administrative complaint, or to enjoin the ensuing administrative proceeding.

Respondent similarly errs in asserting (Br. in Opp. 14) that the "reason to believe" provision in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, is analogous to Section 13(1) of the Interstate Commerce Act, 49 U.S.C. 13(1), recodified by Pub. L. No. 95-473, 92 Stat. 1449, as 49 U.S.C. 1170(b). Section 13(1) requires the Interstate Commerce Commission to provide a forum in which shippers may assert damages claims against carriers for violations of the Act. See, *e.g.*, *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 579 (1966). In the alternative, shippers may elect to pursue remedies against carriers directly in the courts. See 49 U.S.C. 8, 9. Section 5 of the Federal Trade Commission Act, however, does not create such a private remedy. See *FTC* v. *Klesner*, *supra*, 280 U.S. at 25-26; *Alfred Dunhill Ltd.* v. *Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974); *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973). Under respondent's analogy, Section 5 would permit judicial review of the Commission's decision not to issue an administrative complaint. But *Klesner* demonstrates that review is unavailable in those circumstances.

basis for inferring a congressional intent to permit judicial review of the prosecutorial decisions of the Commissioners who, it must be assumed, "will perform faithfully [their] statutory responsibilities." *Morris* v. *Grossette*, *supra*, 432 U.S. at 506 n.23. If the Commission fails to support the allegations reflecting the "reasons to believe" set forth in its complaint, then it must terminate the proceeding without entering any order against respondent, or bear the risk that a reviewing court "will reverse its final order, [and] condemn its proceeding as so much waste motion * * *." *Thermal Ecology Must Be Preserved* v. *AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970).

3. *Review of the Making of a "Reason to Believe" Determination Would Require an Unjustified Inquiry Into the Commissioners' Mental Processes*

Judicial review of whether the Commission in fact made a reason to believe determination would, as Judge Carter pointed out (J.A. 63), require the courts to go behind a certified and facially valid complaint in order to inquire into the mental processes of the Commissioners. As this Court observed in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941), "[j]ust as a judge cannot be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected."

The collegial nature of the decision-making process in the Commission and in similar agencies exacerbates the impropriety of any inquiry into that process. In this case, the district court would have to assess the deliberations of five individuals, only one of whom is currently a member of the Com-

mission,[29] to determine, among other things, whether and to what extent their collective determinations were influenced by congressional pressure. The very nature of this inquiry strongly indicates that whether the Commission "in fact" made a reason to believe determination is a matter that Congress committed to agency discretion and is consequently unreviewable under 5 U.S.C. 701(a)(2).

The presumption of regularity that precludes probing of the decision-making process is especially weighty "where there are administrative findings that were made at the same time as the decision." *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 420. In such a case, "there must be a strong showing of bad faith or improper behavior before such inquiry may be made." *Ibid.* See *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978). Here, the allegations in the administrative complaint constitute the Commission's "findings" that there is "reason to believe" that SOCAL and the other respondents in the administrative proceeding violated the law. Respondent's allegations of bad faith are plainly insufficient to overcome the presumption of regularity.

Respondent's district court complaint alleges that the Commission's staff did not engage in extensive precomplaint investigation directly involving SOCAL (J.A. 6-8); that before the administrative complaint was issued Senator Jackson requested the Commission to prepare a report regarding the relationship

---

[29] At the time of the administrative complaint only present Commissioner Dixon was a member of the Commission.

between the structure of the petroleum industry and the shortage of petroleum products (J.A. 7); that, in transmitting the report to Congress, the Commission's Chairman indicated that the report had not been evaluated or approved by the Commission and requested that the report not be disclosed to the public (J.A. 8-9); and that 12 days after the report was transmitted to Congress and five days after it was made public the Commission filed its complaint (J.A. 9-10). Assuming the truth of these allegations, they do not establish that the complaint was issued without a "reason to believe" determination.

Respondent does not allege facts showing that the Commission issued its complaint under compulsion or duress. Even if the Commission did receive requests from individual members of Congress that it issue an administrative complaint, there is nothing improper in that. Requests that administrative agencies take actions of various kinds within their discretion are very much a part of the political-administrative process and are entirely legitimate and consistent with the public interest. See *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 610-612 (3d Cir. 1977). If members of Congress (or, indeed, any other persons), consider that it is in the public interest for the Commission to initiate a formal proceeding, they have a right to communicate their thoughts, and the Commission has a right to receive and consider such communications.[30] Respondent has not even alleged

---

[30] As the district court remarked (J.A. 51):

> I think the function of the legislators, state and federal, is at least in part to make their views known to ad-

that such communications were made in this case; its allegations are purely circumstantial in character. However, if the mere chronological coincidence of congressional inquiries and Commission investigations may subject initiation of Commission proceedings to collateral challenge in the district courts, then every major agency proceeding addressing matters of current and substantial public interest is likely to be threatened with disruption at the outset by claims of "political" influence.[31]

Nor is there any substance to respondent's contention that the Commissioners did not have sufficient time to evaluate the staff report and make a "reason to believe" determination prior to authorizing the issuance of the administrative complaint. In *National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1144-1146 (2d Cir. 1974), the court (per Friendly, J.) rejected a similar contention that a newly-appointed official had not "exercised his own mental processes at all" (*id.* at 1144) in issuing a rule, where there had been a formal recital that the official had considered the voluminous record. Addressing a contention that it was virtually impossible for the official personally to have considered the massive record in the brief period between taking office

---

ministrative agencies and those who are responsible for the mechanics of government.

[31] This case is not comparable to *Pillsbury Co.* v. *FTC*, 354 F.2d 952, 956, 964 (5th Cir. 1966), where the court vacated the Commission's divestiture order on the ground of "interference" by members of Congress in the Commission's decision on the merits "in its *judicial* function" (emphasis in original).

and issuing the rule, the court held that such allegations were not sufficient to overcome the presumption of regularity that attached to the official's actions.[32] Here, too, respondent's conclusory allegations do not overcome the presumption of regularity in view of the formal recital in the administrative complaint that the Commission had found "reason to believe" that respondent had violated the law.[33]

---

[32] Cf. *Montrose Chemical Corp. of California* v. *Train*, 491 F.2d 63 (D.C. Cir. 1974) (denying FOIA request where disclosure would open up agency's deliberative process to public scrutiny).

[33] Although we disagree with the decisions in *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970) and *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342 (D.C. Cir. 1965), cited by respondent (Br. in Opp. 21), those cases are inapposite in any event. In *Jewel Companies*, the question was whether one Commissioner had correctly concluded that he had no discretion to vote against issuance of a complaint on public interest grounds if "reason to believe" otherwise existed. In *Elmo Division*, the question was whether the district court had jurisdiction to entertain a suit by a party to a prior consent decree to enforce procedural rights that the Commission had granted in its prior decree. See *Action on Safety and Health* v. *FTC*, 498 F.2d 757, 762-763 n.16 (D.C. Cir. 1974). The preliminary issues held reviewable in those cases thus involved pure questions of law as to which no presumption of regularity applies, and, unlike this case, did not require any inquiry into either the thought-processes of the individual Commissioners, or the manner in which the Commission as a body exercised its responsibility to determine whether there was "reason to believe" that a violation occurred.

II. THE COMMISSION'S ISSUANCE OF AN ADMINISTRATIVE COMPLAINT IS NOT "FINAL AGENCY ACTION" SUBJECT TO IMMEDIATE JUDICIAL REVIEW DURING THE PENDENCY OF THE ENSUING ADJUDICATIVE PROCEEDING

The court of appeals further erred in holding that the Commission's issuance of an administrative complaint is "*final* agency action" as to respondent within the meaning of 5 U.S.C. 704. Even if it is assumed that the Commission's decision to initiate a proceeding by issuing a complaint is ultimately subject to judicial review, the court of appeals has disregarded both the limitation of judicial review in Section 704 to "final agency action," and the decisions of this Court upon which Section 704 is based, expressing the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Moreover, by permitting immediate district court review, the court has departed from the statutory scheme established by Congress for review of Commission actions.

Section 704 of the APA specifies that "[a] preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." The Commission's issuance of the administrative complaint in this case and its making of a "reason to believe" determination are plainly only preliminary steps in the

adjudicative process contemplated by 15 U.S.C. 45 (b).[34]

The court of appeals determined that the Commission's action was "final" for purposes of permitting interlocutory review,[35] reasoning (J.A. 61)

---

[34] Under Section 5(b) respondents are entitled to an opportunity for a hearing on the record to "show cause why an order should not be entered by the Commission." 15 U.S.C. 45(b). Pursuant to 5 U.S.C. 554 and the Commission's Rules (16 C.F.R. 3.41), this hearing is conducted before an administrative law judge who renders an initial decision. The burden of proving that the respondent has used or is using unfair methods or deceptive acts and practices is on counsel supporting the complaint. 5 U.S.C. 556(d). Respondents and complaint counsel have the right to appeal adverse effects of the initial decision to the full Commission (5 U.S.C. 557; 16 C.F.R. 3.52), which may enter a final order either dismissing the complaint or directing the respondent to cease and desist from any violations found. In the latter event, the respondent may petition the court of appeals for review. The Commission's order does not become effective—and no penalty may be imposed for violation thereof—until judicial review is completed, or foregone. 15 U.S.C. 45(c), (g)-(j), (*l*).

[35] Relying on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967), the court ruled (J.A. 60-61) that "[t]he finality element in Section 704 should be interpreted in a 'pragmatic' way." *Abbott Laboratories* involved the formal promulgation of an agency regulation that was "quite clearly definitive" and made "effective upon publication." 387 U.S. at 151. Moreover, all parties agreed that the issue raised was "a purely legal one," and "no claim [was] made * * * that further administrative proceedings [were] contemplated." *Id.* at 149. Here, on the other hand, the making of a "reason to believe" determination prior to issuance of an administrative complaint is neither a "definitive" nor an "effective" regulatory act; indeed, the only consequence of such an act is the conduct of formal administrative proceed-

that respondent had effectively exhausted its remedies when it unsuccessfully moved the Commission to withdraw its complaint; that respondent's challenge to issuance of the complaint would become moot if it prevailed before the Commission; that the Commission's rejection of respondent's claim would foreclose respondent from developing relevant facts for purposes of judicial review; and that on review of any decision by the Commission adverse to respondent the Court would not consider alleged defects in the filing of a complaint.

None of this reasoning is persuasive. First, the requirement that administrative remedies be exhausted presumes that judicial review must await "final" agency action, and is not satisfied simply by presenting the agency with a motion for termination of the proceeding at a preliminary stage. Such a motion may raise an *issue*, but if it is denied, the agency's disposition of the motion simply constitutes "[a] preliminary procedural or intermediate agency * * * ruling not directly reviewable [that becomes] * * * subject to review on the review of the final agency action." 5 U.S.C. 704. Even though respondent may have no other means of seeking relief before the Commission with respect to whether a "reason to believe" determination was in fact made, it must await final agency action adversely affecting it be-

---

ings. In further contrast to *Abbott Laboratories*, the issue raised in this case is not purely legal in character, but requires the courts to conduct a factual inquiry by going behind a facially valid complaint to examine the mental processes of the Commissioners.

fore it may seek judicial review. The mere conduct of adjudicative proceedings on charges that may never be sustained cannot be deemed "final" action, and, accordingly, courts will not enjoin conduct of such proceedings on a bare claim that the agency has no statutory or constitutional authority to proceed. See, *e.g.*, *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947), rev'g 156 F.2d 821 (D.C. Cir. 1946); *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 543-544 (1946); *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 221-222 (1938); *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-385 (1938).[36]

Moreover, the court of appeals ignored the principle that "[w]ithout a clear showing of irreparable injury, * * * failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24 (1974). No such injury results from the requirement that a party respond to an administrative complaint, even though litigation ex-

---

[36] As Judge Leventhal observed in *Ass'n of National Advertisers Inc.* v. *FTC*, No. 79-1117 (D.C. Cir. Dec. 27, 1979), slip op. 8 (concurring opinion), "[o]nly in rare instances is a non-final agency action reviewed in the teeth of a general denial of jurisdiction. In *Leedom* v. *Kyne*, 358 U.S. 184 (1958) the Court was willing to by-pass a general jurisdictional barrier when an agency clearly violated an express statutory prohibition. But the *Leedom* exception 'is a narrow one' [*Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964)]. It is reserved for the kind of clear case that identified the original doctrine of mandamus." As explained above (pages [illegible], *supra*), this case is plainly distinguishable from *Leedom*. (41-4

penses may be substantial and unrecoverable and the conduct of litigation burdensome and inconvenient. "[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration, Inc.* v. *Public Service Comm'n, supra,* 304 U.S. at 222; *Renegotiation Board* v. *Bannercraft Co., supra,* 415 U.S. at 24; *Myers* v. *Bethelehem Ship Building Corp., supra,* 303 U.S. at 51-52.[37]

---

[37] The court of appeals incorrectly relied (J.A. 61) on *Mathews* v. *Eldridge,* 424 U.S. 319, 331 n.11 (1976), in support of its "irreparable injury" ruling. That case involved a constitutional objection, wholly collateral to a substantive claim of entitlement to continued payment of Social Security disability benefits. The applicant, who claimed that the lack of a hearing before termination of such benefits denied him due process, had not pursued to final determination by the Secretary his objections to the procedures, which were contained in binding regulations. Instead, unlike respondent here, he sought review under the prescribed statutory procedure (42 U.S.C. 405(g)). This Court treated the initial denial of his claim as a final decision. It ruled that the applicant's "claim to a predeprivation hearing * * * rest[ed] on the proposition that full relief cannot be obtained at a postdeprivation hearing" because loss of disability benefits for a period of time "would damage him in a way not recompensable through retroactive payments," due to his physical condition and dependency. 424 U.S. at 331. No comparable claim of injury results from the Commission's "reason to believe" determination, which simply subjects respondent to litigation. In further contrast to *Eldridge,* respondent's claims are not of constitutional magnitude. Moreover, as shown in the text (pages 55-57, *infra*), if the "reason to believe" question is reviewable at all, the court of appeals may consider it on review of the final order. Thus, unlike *Eldridge,* this is not a case in which "crucial collateral claims [will] be lost and potentially irreparable injury will be suffered" (424 U.S. at 331 n.11).

The court's second ground—that respondent is entitled to immediate review in the district court because its challenge to issuance of the complaint may become moot if respondent prevails in the administrative proceeding—ignores the fact that one of the basic purposes of the exhaustion doctrine is the avoidance of unnecessary judicial consideration of preliminary or procedural rulings entered in the course of an administrative proceeding. See *McGee* v. *United States*, 402 U.S. 479, 484 (1971); *Parisi* v. *Davidson*, 405 U.S. 34, 37-38 (1972). Indeed, the court of appeals' reliance on possible mootness would read the requirement for exhaustion of remedies out of the law, since the same analysis would necessarily apply to every adverse interlocutory ruling made in the course of any administrative proceeding that might terminate in favor of the respondent.

The issuance of an administrative complaint and the agency's denial of a motion to dismiss the complaint are preliminary determinations that do not become "final" merely because they may become moot. The decision below is based on a misconception of the purpose and meaning of the "no other adequate remedy" provision of 5 U.S.C. 704. As Judge Carter concluded (J.A. 65), that provision "was not intended to convert preliminary agency decisions that might otherwise become moot into final agency actions in order to afford judicial review. Rather it is designed to exempt 'final agency action' from judicial review under the APA if there is an adequate alternative legal remedy." See, *e.g.*, *Warner* v. *Cox*,

487 F.2d 1301, 1304 (5th Cir. 1974) (Tucker Act considered an adequate remedy). If the agency decision is, as here, not effectively "final," the question of whether or not there is an "adequate" alternative judicial remedy need not even be reached.

Third, review of respondent's claim in the court of appeals following the entry of a cease and desist order would not be inadequate on the court's theory that the Commission has denied respondent an opportunity to make a record on its claim that the complaint was improperly issued. If the agency record is inadequate on any reviewable issue, the court of appeals may either remand the proceeding to the Commission for supplementation of the record, or modify or set aside the Commission's order, with or without remand, as it deems appropriate. 15 U.S.C. 45(c); 5 U.S.C. 705; see *Dolcin Corp.* v. *FTC*, 219 F.2d 742, 750-752 (D.C. Cir.), cert. denied, 348 U.S. 981 (1955).

The court's final reason in favor of interlocutory review—that an appellate court reviewing a final order would have no occasion to reach respondent's claim that the complaint was unlawfully issued—is also unsound. The mere possibility that an issue might not be reviewable at a later stage is not sufficient reason to justify interlocutory review. See, *e.g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, *supra*, 333 U.S. at 113-114. Moreover, if the court of appeals was correct in holding that the "reason to believe" standard is a judicially

enforceable restriction on the Commission's discretion, then the Commission's application of that standard, like any other preliminary ruling preserved in the administrative proceeding, may be reviewed in connection with any cease and desist order ultimately issued by the Commission. 5 U.S.C. 704; 15 U.S.C. 45(c).

The court of appeals nevertheless may have believed, although it is unclear, that the preliminary determination would become irrelevant if the Commission ultimately found substantial evidence supporting the complaint.[38] Two theories in support of such an approach might be advanced. Under one, if the Commission subsequently found substantial evidence, then the defect in issuing the complaint might cease to be "prejudicial" error under 5 U.S.C. 706.[39] Under the other, the preliminary determination to issue the complaint might be viewed as "merging" into the final determination on the merits. Cf. *Hills Bros.* v. *FTC*, *supra*, 9 F.2d at 484. These theories

---

[38] The court stated simply that "an appellate court would proceed to consider only whether the FTC order is supported by the evidence and a reasonable legal theory, and therefore, would have no reason to reach the issue raised by SOCAL of an unlawful complaint." (J.A. 61) It cited *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367-368 (1967), but that case involved only review of a final cease-and-desist order, not a challenge to a determination preliminary to issuance of an administrative complaint.

[39] The last sentence of that section requires that in making determinations under 5 U.S.C. 706(2)(A)-(F) "due account shall be taken of the rule of prejudicial error."

further demonstrate that the court's premise of reviewability is erroneous. In any event, if the "reason to believe" determination is reviewable at all, there is no statutory restriction on the authority of the court of appeals, as the forum for "the special statutory review proceeding relevant to the subject matter" (5 U.S.C. 703; see 15 U.S.C. 45(c)), to review whether the Commission's issuance of the administrative complaint without making a preliminary "reason to believe" determination was "without observance of procedure required by law" (5 U.S.C. 706(2)(D)).

The decision of the court of appeals permitting interlocutory district court review of respondent's claim is contrary to the particular method provided by Congress in 15 U.S.C. 45(c) for judicial review of the Commission's orders. This procedure is exclusive, for where Congress has "enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory demand of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965); *City of Tacoma* v. *Tax Payers of Tacoma*, 357 U.S. 320, 336 (1958). Moreover, Congress specified in the Administrative Procedure Act (5 U.S.C. 703) that the proper form of judicial review is "the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless that remedy is inadequate. The deci-

sion so to limit judicial review reflects a policy choice by Congress designed to forestall piecemeal litigation and disruption of the administrative process. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry*, *supra*, 339 U.S. at 600-602; *FPC* v. *Metropolitan Edison Co.*, *supra*, 304 U.S. at 383-384, 385; *Myers* v. *Bethlehem Ship Building Corp.*, *supra*.

55- The court of appeals disregarded its duty to respect that choice. We have shown (pages 57-58, *supra*) that if respondent's claim concerning the making of a "reason to believe" determination is reviewable to all, 15 U.S.C. 45(c) provides an adequate remedy to review that claim. There is thus no need to bifurcate review between the court of appeals and the district court.

The scheme of the FTC Act gives the district courts no role to play in review of Commission actions that may lead to issuance of final orders terminating proceedings or requiring corporations to cease and desist from unfair methods of competition and unfair or deceptive acts and practices. Congress has vested that jurisdiction in the courts of appeals alone. Thus, even assuming that Commission determinations preliminary to issuance of a complaint are reviewable, "the jurisdiction would not lie in the district court, but in the court of appeals, which is where Congress has lodged general jurisdiction to review FTC orders * * *." *Ass'n of National Advertisers, Inc.* v. *FTC*, No. 79-1117 (D.C. Cir. Dec. 27, 1979), slip op. 10

(Leventhal, J., concurring opinion).[40] See *Frito-Lay, Inc.* v. *FTC*, 380 F.2d 8 (5th Cir. 1967); cf. *Atlantic Richfield Co.* v. *FTC*, 398 Supp. 1, 10 (S. D. Tex. 1975), aff'd, 546 F.2d 646 (5th Cir. 1977). See also *Harrison* v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980).

---

[40] At most, interlocutory jurisdiction to review non-final actions could be exercised under the All Writs Act, 28 U.S.C. 1651. But "[to] the extent that the All Writs Act has been used in connection with FTC matters, it is the court of appeals that has been found to have the power to grant relief. *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966)." *Ass'n of National Advertisers, Inc.* v. *FTC*, *supra*, Slip op. 10 (Leventhal, J., concurring)

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General
Department of Justice

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

JOANNE L. LEVINE
MARK W. HAASE
Attorneys
Federal Trade Commission

JUNE 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 321241 340